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No. 93-509

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

NICK MARINO,

Petitioner,

v.

WRITERS' GUILD OF AMERICA, WEST, INC., FRANCIS F. COPPOLA and MARIO PUZO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In their Opposition to Petition for Certiorari ("Opposition"), respondents Writers Guild of America, West, Inc., Francis F. Coppola and Mario Puzo do not question the profound need to assure fundamental fairness in current methods of alternative dispute resolution and do not disagree with Marino that the circuit courts have not provided sufficient guidelines as to what constitutes fundamental fairness. Rather, respondents have misconstrued the basis of Marino's Petition, as well as the nature of the arbitration system in issue, to make the argument that the Court should defer establishing such guidelines until another day.

Marino briefly addresses the arguments raised by respondents below.

ARGUMENT

I. MARINO SEEKS A FAIR ARBITRATION PROCEDURE, NOT THE DETERMINATION OF WRITING CREDITS BY THE COURT.

Respondents argue that Marino is asking for a court to substitute its judgment for that of the writers in determining screen credits. To the contrary, Marino asks only that the Court establish the guidelines of fundamental

fairness in arbitrations generally, i.e., the minimum indicia of fundamental fairness in any arbitration. Thus, Marino does not ask that a court award him credit. Marino seeks only to have the award of screen credit vacated, so that a panel of qualified, impartial arbitrators can make the determination after a hearing on the merits.

Respondents also argue that the Court should leave the determination of screen credits to the writers themselves. Marino agrees that writers should determine writing credits. However, that is not an issue in this case. This action does not challenge, or threaten, writers' exclusive province to determine writing credits. Marino simply contends that the arbitration procedures used by the WGA should meet the same minimum standards of integrity of arbitrations conducted by other entities. Marino's concerns are the same as those of any other party in any other arbitration -- to have the opportunity to be heard on the merits by an impartial trier of fact.

Respondents cite *Ferguson v. Writers Guild of America, West, Inc.*, 226 Cal.App.3d 1382, 277 Cal.Rptr. 450 (1991). In *Ferguson*, a writer who received a shared screen credit for the motion picture "Beverly Hills Cop II" sought to set aside the credit determination so that he could get sole credit. However, he raised none of the issues of fundamental fairness and fair representation which are involved in this action. *See* 226 Cal.App.3d at 1388. The issue raised in connection with identities of the arbitrators was that the plaintiff wanted to take their depositions "to explain and justify their conclusions." The

California Court of Appeal held simply that the plaintiff was not "permitted to conduct an inquisition into the arbitrators' thought processes in reaching their award." 226 Cal.App.3d at 1391.

Here, Marino does not seek to discover the arbitrators' thought processes. Instead, the issue of the identities of the arbitrators involves whether the arbitrators were biased or partial, or whether they existed at all. *Ferguson*, in fact, supports Marino's position. That court held that judicial review is proper to determine "whether the procedures employed deprived the objecting party of a fair opportunity to be heard." 226 Cal.App.3d at 1389.

Thus, contrary to respondents' contention, Marino concurs that writing credits should be determined by writers, but contends that the procedures should afford him a fair opportunity to be heard by impartial individuals.

II. THE ISSUES HERE APPLY GENERALLY TO ARBITRATIONS IN ALL CONTEXTS.

Respondents assert that nothing the Court does here will encourage potential litigants to arbitrate disputes since arbitrations are the norm in disputes over collective bargaining agreements. Respondents thereby seek to limit the application and the importance of the issues raised in the Petition. In so doing, respondents misconstrue the nature of the arbitration here and the applicable authorities.

Respondents claim that the arbitration of screen credits is an arbitration under 29 U.S.C. Section 185(a), and that the Federal Arbitration Act does not apply to "contracts of employment of . . . workers." (Opposition, p. 5, n. 1.) However, 29 U.S.C. Section 185(a) involves the "violation of contracts between an employer and a labor organization representing employees." The determination of screen credits does not involve any "violation of a contract between an employer and a labor organization," and does not involve any "contract of employment of a worker." None of the arbitration procedures here are contained in the collective bargaining agreement; to the contrary, the Minimum Basic Agreement merely provides that the motion picture producers "will accept and follow the designation of screen credits" by the WGA Arbitration Committee.

Similarly, respondents claim the union negotiated the screen credits determination system with the employer. That is simply untrue. There is *no* evidence that any provision of the Screen Credits Manual was established in collective bargaining. Thus, the arbitration procedure in issue is not merely a "labor arbitration" pursuant to 29 U.S.C. Section 185(a), and there is no issue concerning the WGA's conduct in negotiating that system. The issue remains the minimum level of integrity necessary for any arbitration to be considered fundamentally fair.

III. THE WGA'S ATTEMPTS TO CHARACTERIZE ITS ARBITRATION PROCEDURE AS FAIR ARE UNPERSUASIVE.

Respondents contend that the necessary procedural safeguards, such as a hearing on the merits, are provided here because the procedure is divided into three phases. Ostensibly, the lack of procedural safeguards contained in one aspect of the arbitration is somehow remedied by the purported safeguards in other phases. Thus, the WGA implicitly concedes that the second phase of the procedure, in which the arbitrators make the "substantive decision," does not contain the procedural safeguards necessary to assure a fair hearing on the merits, or any hearing at all.

The WGA argues that a writer receives a full hearing on the merits because the WGA sometimes conducts "a pre-arbitration hearing in which factual issues are resolved after a hearing which each party may attend." Opposition at p. 3. However, the "pre-arbitration hearing" concerns only evidentiary questions of a foundational nature, i.e., the authenticity of the screenplays in issue, and the sequence in which they were written.[1] The second phase of the procedure, in which the substantive decision is made, contains *no* procedural safeguards. The third, and final, phase of the procedure, a review by a Policy Review Board, does not substitute for

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[1] Moreover, the participants to a WGA arbitration do not have an absolute right to a pre-arbitration hearing. In this case, Marino requested such a hearing in connection with his 1987 treatment, but the WGA refused to hold one.

the inadequate substantive phase, especially because the aggrieved party has no opportunity to present meaningful evidence to the Board.

Respondents also make several misstatements about the facts of this particular arbitration. For example, respondents state that one arbitrator, not two, failed to read all of the material submitted. The record below squarely contradicts this assertion[2].

Respondents also misconstrue the fact that evidence was received ex parte, claiming that this refers to the arbitrators' consideration of the novel, "The Godfather," and the two earlier motion pictures in the "Godfather" series. Although the WGA failed to put any of this material into evidence (and, hence, the arbitrators also received that material ex parte), that is not the issue which Marino raises. The critical issue lies in the WGA's failure to disclose the arbitration statements of the parties to the other parties, so that the arbitrators improperly received that evidence ex parte.

Finally, respondents claim that the Guild's procedures are unique and, consequently, they are of little

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[2] The first arbitrator who voted against Marino flatly said he "did not read all thirty-three scripts." When the Policy Review Board discovered that this arbitrator had not read Marino's treatment, among thirty-one unread scripts, the WGA sent a copy of that treatment to the arbitrator and asked if his decision would change based on the reading of that treatment. However, the evidence is that this arbitrator never read the thirty other scripts. Furthermore, the second arbitrator who voted against Marino said he did not read the material with "great thoroughness" or with "great scrutiny."

interest to parties in other arbitrations. However, the motion picture industry is not the only industry with distinctive disputes. The motion picture industry, like all others, should be subject to the law governing arbitrations, including the requirement that they be fundamentally fair. Nothing justifies a judicially sanctioned exemption for screen credit arbitrations.

Marino has petitioned this Court to establish guidelines in this area. No unique aspect of determining writing credits is involved here. To the contrary, this petition involves critical issues of the right to be heard by impartial arbitrators, which have universal applicability.

IV. THE DECISIONS OF THE NINTH CIRCUIT AND THE DISTRICT COURT CONFLICT WITH DECISIONS OF THIS COURT.

Respondents contend that the decisions below do not conflict with decisions of this Court. However, to the extent that the District Court and Ninth Circuit held that the WGA need not disclose the identities of the arbitrators, or "any dealings that might create an impression of possible bias," they conflict with this Court's holding in *Commonwealth Coatings Corp. v. Continental Casualty Company*, 393 U.S. 145, 149, 21 L.Ed.2d 301, 89 S.Ct. 337 (1968).

Furthermore, the Ninth Circuit holding that Marino waived his objections is inconsistent with the holding of

Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324, 329-31, 21 L.Ed.2d 519, 89 S.Ct. 548 (1969), that a party does not waive an objection where such an objection would be futile. The fact that the Ninth Circuit recognized that not "every possible procedural defect must be raised in advance or waived," does not mean that affirmance of a summary judgment based on waiver, where there is substantial evidence of futility, does not conflict with *Glover*.

Respondents also argue that there is no dispute among the circuits that a claim of arbitral bias is waived if not raised before the arbitrator is seated. However, in each of the cases cited by respondents, the arbitrators' identities, and bias, were known prior to the hearing, and there was an opportunity to object thereto at the hearing. *See, e.g., Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1359 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) ("The successful party in the grievance may not rely on the failure to object for bias . . . unless [a]ll the facts now argued as to [the] alleged bias were known . . . at the time the joint committee heard their grievances.'")

Here, Marino to this day does not know the identities of the arbitrators,[3] and raised his objection to

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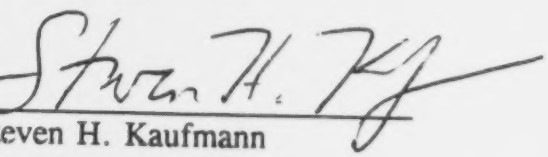
[3] Respondents note that Marino struck various names from a list of the 1600 potential arbitrators. However, not only did they WGA's Assistant Director testify that it was impossible for a party to determine the potential bias of these 1600 potential arbitrators, but the three actual arbitrators were selected by the Screen Credits Coordinator, who demonstrated bias against Marino.

the secrecy of their identities at the first, and only, opportunity, i.e., the hearing before the Policy Review Board.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

By: 

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